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Elephant in the Locker Room: Does the National Football League Discriminate in the Hiring of Head Coaches?, The

Neil Forester

University of the Pacific; McGeorge School of Law

The Elephant in the Locker Room: Does the National Football League Discriminate in the Hiring of Head Coaches?

Neil Forester*

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I. INTRODUCTION

Consider the following hypothetical situation. A young starry-eyed individual, eager to begin the long journey down his or her career path of choice, and equally eager to have a significant impact within that chosen profession, takes the first

* J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2004; B.A., California State University, Sacramento, 2000.

tentative steps towards success by starting out at the bottom of the pecking order. Slowly, over years, the young person gains experience, makes the right connections and learns the trade inside and out, while enjoying a steady rise up the ladder of success.

This older and more experienced individual begins to see the pinnacle at the journey's end more clearly. Those already at the top offer encouragement, and it appears that, for newcomers to reach the peak of success, those already there must extend their hands to assist in that final step. Yet no one reaches out; others continue to get the hand up to the top, but not our climber. Our climber is stuck, and it does not appear as if that last step will ever be taken.

This hypothetical seems fanciful at first, but it likely would appear much more realistic to a certain group of people attempting to gain access to the highest positions within their chosen field. These people are qualified, they are dedicated, and they want to be head coaches in the National Football League.[1] They are also black.

Part II of this article will explore the history of the National Football League in terms of its minority hiring practices,[2] particularly as it relates to the recent threat of a class-action suit on behalf of black head coaching candidates who either have been passed over for promotion or simply denied the opportunity to interview for head coaching positions. In conjunction with this discussion, Part III will provide some background information on bringing a suit under Title VII of the Civil Rights Act of 1964 (Title VII),[3] and Part IV will evaluate the potential success of such a suit if brought against the NFL or any of its franchises. Finally, Part V will propose some suggestions and realistic solutions to the current problem.

II. THE STATISTICS IN THE NATIONAL FOOTBALL LEAGUE

A. The Madden Report

In September of 2002, Janice Fanning Madden, a professor of sociology at the University of Pennsylvania, published a statistical analysis entitled *Differences in the Success of NFL Coaches by Race, 1986-2001: Evidence of*

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1. *See generally* Sherre Holder, *First & Goal! (Lack of Opportunities for African Americans in Professional Sports Management)*, BLACK ENTERPRISE, Feb. 1999, *available at* http://www.findarticles.com/cf_0/m1365/7_29/54195605/print.jhtml/ms/nfl/report.pdf (last visited Aug. 25, 2003) (copy on file with the *McGeorge Law Review*) (discussing the experiences of several black coaches in the NFL as they have awaited opportunities for promotion to head coach).

2. *See* Johnnie Cochran, Jr. & Cyrus Mehri, *Black Coaches in the National Football League: Superior Performance, Inferior Opportunities*, Sept. 2002, at 1-16, *available at* http://www.findjustice.com/ms/nfl/report.pdf (last visited Aug. 25, 2003) (copy on file with the *McGeorge Law Review*) (discussing several black head coaching candidates and their experiences and qualifications).

3. *See* 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1996) (laying out the requirements for an employment discrimination claim).

Last Hire, First Fire (The Madden Report).[4] The report begins by noting that "[b]etween the 1986 and the 2001 seasons, 86 whites, but only 5 African Americans, coached an NFL team for at least a full season."[5] Professor Madden compared this number, a little more than five percent, with the number of black assistant coaches in the League (28%) and the number of black players in the League (67%).[6] The numbers would suggest that some factor or factors are affecting the availability of head coaching positions to African Americans in the NFL.[7]

In spite of the obvious statistical disparity, however, the report notes that "no study . . . has examined racial disparities in performance, or in appointment to, head coaching positions. . . ."[8] Upon compiling her data, Professor Madden discovered that black coaches in the League during the relevant time period outperformed their white counterparts.[9] Between 1986 and 2001, black coaches averaged 9.1 wins per year, while white coaches averaged only eight.[10] The numbers are even more striking for playoff performance—two-thirds of black coaches led their teams to the playoffs during the relevant seasons, but only 39% of white coaches did so.[11]

Another key factor in calculating success as a head coach is performance during the first year, and again it would appear that black coaches have historically outperformed white coaches.[12] Black coaches in their first year of coaching averaged 9.5 wins, 66% of them making the playoffs; white coaches in their first year averaged only 6.8 wins, and only 20% of them made the playoffs.[13]

In spite of the demonstrated success, the report goes on to indicate that black coaches who were forced to leave their positions had won more games in their final seasons than white coaches who had suffered the same fate.[14] The five black coaches terminated between 1986 and 2001 averaged 6.8 wins, in contrast to the sixty-five white coaches fired, who averages only 5.5 wins.[15] Not surprisingly,

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4. Janice Fanning Madden, *Differences in the Success of NFL Coaches by Race, 1986-2001: Evidence of Last Hire, First Fire*, Sept. 2002 (on file with the *McGeorge Law Review*) [hereinafter *The Madden Report*].

5. *Id.* at 2.

6. *Id.*

7. *See id.* at 2, 9 (suggesting reasons for the "relatively few black coaches in the National Football League . . . ."); *cf. id.* at 3-4 (describing a number of studies that have taken a variety of factors into account in analyzing the NFL's player hiring practices).

8. *Id.* at 4.

9. *See id.* at 5-8 (analyzing the statistical success of black head coaches as compared to white head coaches).

10. *Id.* at 5.

11. *Id.* at 5-6.

12. *See id.* at 6 (noting that 66% first-year black head coaches made the playoffs while only 20% of first-year white head coaches did so).

13. *Id.*

14. *See id.* (stating that "African American coaches who were forced to leave their jobs . . . were winning more games than white coaches" who were forced to leave).

15. *Id.*

those terminated black coaches also made the playoffs in 20% of the cases, while only 8% of the terminated white coaches had done so.[16]

These numbers suggest that NFL franchises demand more from a black coach, and will terminate one more quickly.[17] Professor Madden's report does indicate that, because of the small sample size of black coaches in the League, the numbers may be misleading.[18] However, the small sample size is itself indicative of the fact that NFL franchises have a sparse record in terms of minority hiring.[19]

B. The Cochran-Mehri Analysis

Attorneys Johnnie Cochran, Jr. and Cyrus Mehri compiled an updated report based on Professor Madden's statistical data.[20] The extensive coverage of the topic area relates principally to specific black head coaching candidates that may have been passed over for promotion in spite of their strong qualifications.[21]

Sherman Lewis, an assistant coach in the League for fourteen years, during which four of his teams won the Super Bowl, remained an assistant following his latest Super Bowl win, even though positions were open.[22] He was not even granted an interview.[23] Emmitt Thomas, an assistant coach with a cumulative thirty-five years of NFL experience and two Super Bowl rings, "has rarely been offered the opportunity to interview for a head coaching position," even though his reputation for defense is one of the strongest in the League.[24] Art Shell, who actually did serve as the head coach for the Raiders but was later fired, has never been offered another such opportunity.[25] Since his termination, several other former head coaches have been offered a second chance, even though they had not previously posted a winning season, as Art Shell had done with the Raiders.[26]

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16. *Id.* at 7.

17. *See id.* at 9 (asserting that "black [head] coach candidates in the [coaching] pipeline seem to be held to a higher standard").

18. *See id.* at 10 n.6 (claiming that "[w]hile most of the racial differences reported here are strong enough that a statistical test dismisses chance or random variation as the reason for racial differences, in the end, there are simply too few black coaches for more detailed statistical analyses to be powerful").

19. *Cf. id.* at 9 (concluding that the small number of African American head coaches indicates African American candidates are held to higher standards by the NFL teams).

20. *See* Cochran & Mehri, *supra* note 2, at 2-6 (considering recent trends in light of *The Madden Report*).

21. *See id.* at 8-10 (describing the "troubling practices and trends concerning those "talented men with decades of experience" who "have earned the right to be fairly considered").

22. *Id.* at 8.

23. *Id.*

24. *Id.* at 8-9; *see also id.* at 9 (noting that Thomas coached the Philadelphia Eagles' defense to a top five League ranking in numerous categories from 1995 to 1998).

25. *See id.* at 6, 9 (pointing out that Shell has been passed over for seven years in favor of several white coaches who did not have winning seasons).

26. *Id.*

Cochran and Mehri contend that the NFL's progress toward equal opportunity "remains dismal."[27] Of the twenty-one head coaches hired in the last three years, only two have been African American, and of those two, only Herman Edwards represented a "'new' black coach hire."[28] In 2000, the nine head coaches hired were all white.[29] The Arizona Cardinals hired as head coach their defensive coordinator, Dave McGinnis, even though the years he had spent as the defensive coordinator failed to yield a winning season.[30] The Miami Dolphins hired Dave Wannstedt, after he led the Chicago Bears to three consecutive losing seasons as that franchise's head coach.[31]

In 2002, of seven head coaches hired, only Tony Dungy was black.[32] However, his hiring by the Indianapolis Colts did not represent an addition to the NFL black head coaching ranks because he simply changed teams;[33] he had been terminated from a head coaching position with the Tampa Bay Buccaneers after several winning seasons.[34] Dennis Green, a black head coach with the Minnesota Vikings, had been fired in 2001 after producing a near decade-long winning percentage of 63%.[35] He was not interviewed for any other head coaching vacancy in 2002.[36] Marty Schottenheimer, a white head coach who had been fired during the same time frame, was immediately offered a position as the head coach of the San Diego Chargers.[37] The Vikings had the opportunity to promote Sherman Lewis, then Green's offensive coordinator, but instead promoted Lewis's own assistant, Mike Tice, over Lewis.[38] The result of these moves over the last three seasons is that the NFL now employs the lowest percentage of black head coaches in more than a decade.[39]

Cochran and Mehri offer some explanations for the present situation in the League.[40] One of the explanations offered is the League's "anti-tampering" policy, which proscribes organizations from interviewing or hiring coaches from other teams until after the playoffs.[41] Because black head coaches have a

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27. *Id.* at 10.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 11.
33. *Id.*
34. *Id.* at 7-8, 11-12.
35. *Id.* at 11.
36. *Id.*
37. *Id.*
38. *See id.* (noting that, before Tice's promotion to head coach, Tice actually reported to Lewis in his capacity as offensive line coach).
39. *Id.* (adding that "the actual number of black head coaches" in the League before the beginning of the 2002 season had dropped from three to two).
40. *See id.* at 13-14 (detailing the lack of diversity among those responsible for hiring, the lack of diversity in the candidate lists, and the League's anti-tampering policy as contributing to the problem).
41. *Id.* at 13.

demonstrated record of success, they will more often be involved in post-season play, and will hence be unavailable to interview with teams looking to make a quick change from an unsuccessful coach.[42]

Another explanation Cochran and Mehri offer is the fact that NFL teams are not required to hire from a diverse slate of head coaching candidates, either internally or by the League office.[43] Due to the well-known fact that many organizations have already pre-selected a new head coach before any interviews have been granted, "even highly qualified black NFL assistant coaches . . . have trouble getting on the radar screen of NFL decision-makers."[44]

The most troubling of the explanations Cochran and Mehri suggest concerns the current make-up of the NFL owners pool.[45] Every NFL owner is white.[46] Most of the team general managers are also white.[47] Owners and general managers are those generally responsible for hiring head coaches.[48] Although Cochran and Mehri add the caveat that this does not necessarily indicate "overt or conscious racism," this information suggests the possibility that the groups responsible for hiring head coaches are operating in a racially suspect manner.[49]

The situation described in *The Madden Report* and in the Cochran-Mehri analysis led the authors of the latter to offer what they call the "Fair Competition Resolution."[50] The resolution proposes rewarding teams that consider a diverse slate of head coaching candidates when making hiring decisions with extra draft picks, and similarly rewards organizations with diverse front office staffs.[51] The resolution also proposes a penalty of a forfeited draft pick for teams that opt out of the program by refusing to consider qualified candidates of diverse racial groups in making hiring decisions.[52] The response to the resolution by the ownership group has been predictably lukewarm.[53]

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42. *See id.* at 13 (suggesting that the success of the qualified African American candidates during the regular season may actually contribute to their absence from head coaching candidate slates).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* (noting that "[t]he second most important person in the decision-making process is the team's general manager," and "only one is black").

48. *Id.*

49. *See id.* (suggesting that Cochran and Mehri's experiences in cases involving American corporations may indicate that the underlying motive for such decisionmaking "is about people being most comfortable with those who are most familiar to them").

50. *See id.* at 14-15 (outlining a potential solution to the problem).

51. *Id.* at 15-16.

52. *Id.* at 15.

53. *Cf.* Michael Wilbon, *Hung Out to Dry on the Color Line*, WASH. POST, Feb. 14, 2003, at D01 *available at* http://www.washingtonpost.com/ac2/wp-dyn/A5401-2003Feb13 (last visited Aug. 26, 2003) (copy on file with the *McGeorge Law Review*) (claiming that the rule "requiring NFL teams to interview minority candidates for head coaching positions is something that for the most part has been treated as a joke").

III. BRINGING SUIT—TITLE VII

These statistics raise a question that Cochran and Mehri themselves have raised implicitly in their analysis of the current situation in the NFL head coaching ranks.[54] Does the conduct of the National Football League front office or the individual franchises constitute unlawful employment practice in contravention of Title VII?[55] Claims of employment discrimination brought under Title VII may fit into two broad and overlapping categories—"disparate treatment" and "disparate impact."[56] The type and level of proof for each kind of claim vary somewhat, and tend to overlap at certain points.[57]

A. *Disparate Treatment*

Disparate treatment claims arise from overt discriminatory action by employers.[58] Section 703(a)(1) of Title VII provides that "[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin. . . ."[59] The seminal Supreme Court case dealing with employment discrimination is *McDonnell Douglas Corp. v. Green*.[60]

1. McDonnell Douglas Corp. v. Green

In *McDonnell Douglas*, the Supreme Court delineated the analysis of a disparate treatment claim.[61] In that case, Percy Green, a black mechanic alleged that the "general hiring practices" of his employer, McDonnell Douglas, were

54. *See supra* Part II (assessing the statistics in reference to the possibility of implicit race discrimination in the NFL).

55. *See* 42 U.S.C.A. §§ 2000e-2 to -3 (West 1996) (laying out the framework for an employment discrimination claim).

56. *Id.*

57. *See generally* Ann K. Wooster, Annotation, *Title VII Race or National Origin Discrimination in Employment—Supreme Court Cases*, 182 A.L.R. FED. 61 (2002) (discussing the two types of claims).

58. 42 U.S.C.A. § 2000e-2 (West 1996); *see* Wooster, *supra* note 57, § 1 (stating that Title VII was "enacted to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race . . . in an effort to open employment opportunities for African Americans in occupations which had been traditionally closed to them").

59. 42 U.S.C.A. § 2000e-2(a) (West 1996).

60. 411 U.S. 792 (1973); Mane Hajdin, *The McDonnell Douglas Standard in Lending Discrimination Cases: A Circuit Split?*, 33 MCGEORGE L. REV. 1, 3 (2001).

61. 411 U.S. at 802-07.

racially suspect.[62] Green had worked for the company for eight years until he was terminated in 1964 as part of a general work force reduction.[63]

Green was an activist in the civil rights movement, and had participated in protests that had targeted McDonnell Douglas.[64] On one occasion, he and others unlawfully parked their cars on main thoroughfares, essentially barring access to the plant during the morning shift change.[65] When the police arrived and asked Green to move his car, he refused.[66] Green was arrested and pleaded guilty to obstructing traffic.[67]

In 1965, a group of which Green was a member staged a "lock-in" at a building that housed McDonnell Douglas offices.[68] The extent of his participation in the protest was disputed, though he acknowledged that he knew and approved of it.[69] Following the lock-in, McDonnell Douglas began advertising for mechanics.[70] Green applied, and was rejected.[71] McDonnell Douglas based its rejection on Green's protest activities.[72] Green promptly filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging race discrimination and discrimination for his "involvement in the civil rights movement."[73]

The EEOC did not make any findings concerning the charge of racial bias,[74] but found reasonable cause for a violation of section 704(a) of Title VII.[75] The district court ruled that unlawful protest activities were not protected under Title VII, and that the EEOC had not found reasonable cause for bringing a claim of racial discrimination.[76] The Eighth Circuit reversed the district court's ruling

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62. *See id.* at 794 (noting that Green's termination had been pursuant to "a general reduction in petitioner's work force").

63. *Id.*

64. *See id.* (delineating several protest activities in which Green had participated).

65. *Id.* at 794-95.

66. *Id.* at 795.

67. *Id.*

68. *Id.* at 795 & n.3 (stating that Green had been chairman of ACTION, a civil rights group, at the time of the protest).

69. *Id.*

70. *Id.* at 796.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 797; *see* Susan Schenkel-Savitt, *Race and Ethnicity Discrimination Under Title VII and Sec. 1981*, *in* HANDLING YOUR FIRST EMPLOYMENT DISCRIMINATION CASE 1998, at 27 (PLI N.Y. Practice Skills Course, Handbook Series No. F0-001Y, 1998) (discussing the procedural requirement of filing a charge of discrimination with the Equal Employment Opportunity Commission to initiate an employment discrimination claim).

75. *See McDonnell Douglas*, 411 U.S. at 797 (explaining that the EEOC had found reasonable cause for believing that McDonnell Douglas had refused to hire Green for his civil rights activities).

76. *Id.*

concerning the necessity of an explicit finding by the EEOC before a claim for race discrimination may be brought, and remanded the case.[77]

The Supreme Court granted certiorari to clarify the standards governing claims of disparate treatment under Title VII.[78] The Court announced a four-prong test to establish a prima facie case of racial discrimination.[79] The plaintiff must show:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[80]

The Court found that Green had met his prima facie burden, and held that, once the prima facie case has been established, "[t]he burden then . . . shift[s] to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[81] The Court further held that McDonnell Douglas had met its burden by alleging that Green's participation in illegal conduct was the reason for his rejection.[82] The Court went on to hold that, following the rebuttal of the plaintiff's prima facie case with a showing of a nondiscriminatory reason behind the action, the plaintiff must be afforded an opportunity to introduce evidence that the asserted reason is only a pretext for discrimination.[83]

The Court listed a number of factors that would be pertinent to a showing of pretext, including an employer's "general policy and practice with respect to minority employment."[84] The Court emphasized that "statistics as to . . . employment policy and practice may be helpful to a determination of whether . . . refusal to rehire . . . conformed to a general pattern of discrimination against blacks."[85]

Upon finding that Green had in all probability met his prima facie burden, and that McDonnell Douglas had successfully rebutted, the Court remanded the case to the district court for reconsideration.[86] On remand, Green was to "be

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77. *See id.* at 797-98 (noting that "a prior [Equal Employment Opportunity] Commission determination of reasonable cause [for a finding of racially discriminatory hiring practices] was not a jurisdictional prerequisite to raising a claim . . . in federal court").

78. *Id.* at 798.

79. *See id.* at 802 (stating that the complaining party in such a case carries the initial burden of proof).

80. *Id.*

81. *Id.* (adding that McDonnell Douglas did not dispute Green's qualifications, and "acknowledge[d] that his past work performance in [its] employ was 'satisfactory'").

82. *Id.* at 803.

83. *See id.* at 803-04 (indicating that a relevant inquiry might be whether white employees who had behaved similarly had been retained or rehired).

84. *Id.* at 804-05.

85. *Id.* at 805.

86. *Id.* at 807.

afforded a fair opportunity to demonstrate that [McDonnell Douglas's] assigned reason for refusing to re-employ was a pretext or discriminatory in its application."[87]

In *McDonnell Douglas*, the Supreme Court "created the well-known burden-shifting standard for litigation under Title VII. . . ."[88] This shifting of burdens from plaintiff to defendant and back is often referred to as the *McDonnell Douglas* standard.[89] In *St. Mary's Honor Center v. Hicks*,[90] the Court revisited the *McDonnell Douglas* framework and clarified its holding.[91]

2. St. Mary's Honor Center v. Hicks

Hicks, a black correctional officer at St. Mary's with a "satisfactory employment record," came under the supervision of a new superintendent.[92] Not long thereafter, he became involved in a number of increasingly severe disciplinary actions for certain rule violations.[93] He was reprimanded, demoted and ultimately fired following a heated verbal exchange during which he threatened his supervisor.[94]

Hicks alleged a disparate treatment violation of Title VII section 703(a)(1).[95] The district court "found that the reasons [St. Mary's] gave [for terminating Hicks] were not the real reasons for [his] demotion and discharge."[96] However, the district court "held that [Hicks] had failed to carry his ultimate burden of proving that *his race* was the determining factor in [St. Mary's] decision."[97]

The Court of Appeals for the Eighth Circuit reversed and remanded.[98] In reversing the court of appeals, Justice Scalia—writing for the majority of the Supreme Court—noted that "rejection of the defendant's proffered reasons [for the allegedly discriminatory action] will *permit* the trier of fact to infer the ultimate fact of intentional discrimination," but "the Title VII plaintiff at all times bears the 'ultimate burden of persuasion.'"[99] That ultimate burden is to prove intentional discrimination, and, while the rejection of defendant's proffered

87. *Id.*

88. Hajdin, *supra* note 60, at 1.

89. *See id.* at 1-2 (clarifying that the ultimate burden of persuasion of discrimination remains with the plaintiff, while the defendant merely has a burden of production to rebut plaintiff's prima facie case).

90. 509 U.S. 502 (1993).

91. *See id.* at 517-18 (insisting that *McDonnell Douglas* requires that the plaintiff prove racially discriminatory intent).

92. *Id.* at 504-05.

93. *Id.* at 505 (describing Hicks's violations, including alleged failure to investigate adequately an inmate brawl and failure to ensure that those under his supervision correctly logged their use of a St. Mary's vehicle).

94. *Id.*

95. *Id.*

96. *Id.* at 508.

97. *Id.*

98. *Id.* at 505.

99. *Id.* at 511.

reason may allow a fact finder to infer that intent, it does not necessarily compel it.[100] Justice Scalia went on to quote *McDonnell Douglas*: "We . . . insist that respondent under [Title VII] § 703(a)(1) must be given a full and fair opportunity to demonstrate by competent evidence *that whatever the stated reasons for his rejection, the decision was in reality racially premised.*"[101]

B. Disparate Impact

Under Title VII, disparate impact cases arise from the discriminatory effect of a facially neutral employment test or hiring practice.[102] Section 703(a)(2) of Title VII prohibits employment practices that "limit, segregate, or classify [an employer's] employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [the employee's] status as an employee, because of such individual's race, color, religion, sex, or national origin."[103]

Title VII further provides that:

> [a]n unlawful employment practice based on disparate impact is established . . . only if a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity. . . .[104]

Section 703(m) of Title VII states that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[105]

1. Griggs v. Duke Power Co.[106]

In *Griggs v. Duke Power*, the Duke Power Company in 1955 initiated a policy that required all employees in four out of five employment departments to

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100. *Id.*

101. *Id.* at 517-18 (alteration in original) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973)).

102. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) (finding that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices"); *see also* Wooster, *supra* note 57, § 14 (outlining the proof requirements for disparate impact claims).

103. 42 U.S.C.A. §§ 2000e-2(a) to -2(a)(2) (West 1996).

104. *Id.* §§ 2000e-2(k)(1)(A) to -2(k)(1)(A)(i).

105. *Id.* § 2000e-2(m) (West 1996).

106. 401 U.S. 424 (1971).

have a high school education.[107] The remaining department (Labor) previously was the only one in which black employees could work, and was also the lowest paying department.[108] Ten years later, coinciding with the effective date of Title VII, the company modified its policies in relation to new employees by requiring "satisfactory scores on two professionally prepared aptitude tests" before any employee could transfer out of Labor.[109]

The two tests did not purport to measure aptitude to perform a particular task in relation to the employment.[110] They measured only general intelligence and mechanical comprehension.[111] A group of black employees sued, alleging that the tests operated to disqualify a disproportionate number of blacks from promotion to other departments, that they bore no demonstrable relation to the jobs to be performed, and that they merely perpetuated the previous policy of overt racial discrimination.[112]

Both the district court and the Fourth Circuit Court of Appeals concluded that the tests did not offend Title VII.[113] The court of appeals held that "in the absence of discriminatory purpose, use of such requirements was permitted by the Act."[114] The Supreme Court reversed, asserting that the clear objective of Congress in enacting Title VII was "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[115] Intent was not the touchstone of the inquiry.[116] The Court further held that "[i]f an employment practice which operates to exclude [blacks] cannot be shown to be related to job performance, the practice is prohibited."[117]

2. Wards Cove Packing Co. v. Atonio[118]

Wards Cove Packing Co. v. Atonio addressed the questions whether subjective employment practices were subject to Title VII and what kinds of statistics could be used to establish a prima facie case of disparate impact under

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107. *Id.* at 427.

108. *Id.*

109. *Id.* at 427-28.

110. *Id.* at 428.

111. *Id.*

112. *Id.* at 425-26.

113. *Id.* at 428-29.

114. *Id.* at 429.

115. *Id.* at 429-30.

116. *See id.* at 430 (stating that "[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices"); *id.* at 432 (declaring that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability").

117. *Id.* at 431.

118. 490 U.S. 642 (1989).

Title VII.[119] This case concerned the employment practices of two companies operating salmon canneries in Alaska.[120] As part of its seasonal activities, a cannery would hire for various "cannery" and "noncannery" positions.[121] The cannery positions were considered primarily unskilled, and involved the bulk of the line work, whereas the noncannery positions involved skilled labor for machinists, engineers, and the like.[122]

Cannery positions tended to be held by Alaska Natives and Filipinos, while the noncannery jobs were filled predominantly by whites.[123] The suit was brought by a class of employees and former employees alleging both disparate treatment and disparate impact under Title VII.[124] They claimed that the canneries' hiring and promotion practices "were responsible for the racial stratification of the work force and had denied them and other nonwhites employment as noncannery workers on the basis of race."[125]

The district court rejected all claims, holding that subjective hiring criteria were not subject to disparate impact analysis at all, and the objective criteria which otherwise would be subject to such analysis had failed in terms of proof.[126] Initially, the Ninth Circuit Court of Appeals affirmed, but later vacated that decision after a hearing en banc.[127] The court of appeals, sitting en banc, held that subjective hiring practices could be subject to disparate impact analysis, and that "'[o]nce the plaintiff class has shown disparate impact caused by specific, identifiable employment practices or criteria, the burden shifts to the employer' to 'prov[e the] business necessity' of the challenged practice."[128]

The court of appeals remanded to a panel, which found that the statistics of racial stratification between skilled and unskilled positions at the canneries established the prima facie case.[129] The Supreme Court, however, reversed, holding that "[t]he 'proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market,'" not the comparison between employees of a particular company.[130] The Court added that in some cases such statistics would be

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119. *Id.* at 645-46, 650; *see* Wooster, *supra* note 57, § 2(a) (describing the disparate impact analysis in the *Wards Cove* case).

120. *Wards Cove Packing Co.*, 490 U.S. at 646.

121. *Id.* at 647.

122. *Id.*

123. *Id.*

124. *Id.* at 647-48.

125. *Id.*

126. *Id.* at 648 (stating that the district court found employment practices such as a "language requirement, . . . nepotism, failure to post . . . openings, [and] the rehire preference" were "subject to challenge under the disparate impact theory," but were "rejected for failure of proof").

127. *Id.*

128. *Id.* (alteration in original) (citations omitted) (quoting Atonio v. Ward's Cove Packing Co., 810 F.2d 1477, 1985-86 (9th Cir. 1987)).

129. *Id.* at 649-50.

130. *Id.* at 650-51 (alteration in original) (quoting Hazelwood Sch. Dist. v. United States, 433 U.S. 299,

impossible to gather, and "certain other statistics—such as measures indicating the racial composition of 'otherwise-qualified applicants' for at-issue jobs—are equally probative for this purpose."[131]

The rationale the Court applied to its finding centered on the practical effect of employing such statistics when looking for a disparate impact.[132] If the only burden on a plaintiff was to show employment statistics that do not reflect an equal racial distribution, then the only feasible course of action left open to employers would be a racial quota system "insuring that no portion of their work forces deviated in racial composition from the other portions thereof. . . ."[133] Additionally, the Court quoted from its decision in *Watson v. Fort Worth Bank & Trust*[134] on the issue of causation:

> "[W]e note that the plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's workforce. The plaintiff must begin by identifying the specific employment practice that is challenged. . . . Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."[135]

Therefore, to make out a prima facie case of disparate impact, a plaintiff may use statistics to show a disparity, but must still prove that a particular practice caused the discriminatory impact.[136]

If the plaintiff successfully presents a prima facie case, the employer is entitled to demonstrate that the challenged practice is justified by business necessity.[137] The Supreme Court in *Wards Cove* was careful to stipulate that this does not shift the burden of persuasion from the plaintiff to the defendant.[138] "It is [the plaintiff] who must prove that it was 'because of such individual's race, color,' etc., that he was denied a desired employment opportunity."[139]

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308 (1977)) (exposing flaws in the lower court's reasoning, "[m]ost obviously, with respect to the skilled non-cannery jobs . . . , the cannery work force in no way reflected 'the pool of *qualified* job applicants' or the '*qualified* population in the labor force'").

131. *Id.* at 651.

132. *Id.* at 651-52.

133. *Id.* at 652 (stating that "this is a result . . . Congress expressly rejected in drafting Title VII").

134. 487 U.S. 977 (1988).

135. *Wards Cove Packing Co.*, 490 U.S. at 656 (alteration in original) (quoting *Watson*, 487 U.S. at 994).

136. *See id.* at 657 (stating that "[s]uch a showing is an integral part of the plaintiff's prima facie case in a disparate-impact suit under Title VII").

137. *Id.* at 659.

138. *Id.* at 659-60.

139. *Id.* at 660.

Even if a defendant employer is successful in asserting a valid business justification, a plaintiff may still prevail.[140] The plaintiff would have to demonstrate that alternative nondiscriminatory practices existed, that these alternatives would not substantially burden the employer, and that the employer rejected the alternatives in favor of the challenged practice.[141] "[S]uch a refusal," stated the Court, "would belie a claim by [defendants] that their incumbent practices are being employed for nondiscriminatory reasons."[142]

C. *The NFL Against the Backdrop of Disparate Treatment and Disparate Impact*

In light of the backdrop discussed above, a black coach bringing suit under Title VII's disparate treatment or disparate impact analysis first would have to decide whom to sue.[143] There are two options—he could go after the NFL itself, or he could go after the particular franchise that allegedly discriminated.[144]

1. Is the NFL a Proper Defendant?

This threshold question seems easy at first.[145] The NFL (franchiser) establishes policies; it does not supervise individual teams (franchisees).[146] If the League office is not responsible for an individual franchise's hiring policy and it does not employ the staff of the franchisee, then it should not be held responsible for whatever discriminatory intent may be imputed to that franchise.[147] Absent overt discrimination within the League office itself, a case against the League seems unlikely to remedy an injury to a black head coaching candidate.[148]

If the NFL is not responsible for discrimination in its member franchises, then who is responsible for League oversight?

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140. *Id.*

141. *See id.* at 660-61 (requiring that "any alternative practices . . . offer[ed] up in this respect must be equally effective as [the defendant's] chosen hiring procedures in achieving [the defendant's] legitimate employment goals").

142. *Id.* at 661.

143. *See supra* Part III.A-B (examining Title VII disparate treatment and impact analyses); *see also* Schenkel-Savitt, *supra* note 74, at 26-27 (setting forth the basic requirements for initiating Title VII suits for employment discrimination).

144. *See* Schenkel-Savitt, *supra* note 74, at 26 (laying out the foundational definition of "employer" within the meaning of Title VII).

145. *See id.* (citing Title VII's definition of "employer" as an entity employing fifteen or more people).

146. *See* Michael Lev, *Buffalo's Hire Puts League in Spotlight*, ORANGE COUNTY REG., Feb. 9, 2001, at Cover (noting that the NFL cannot "make the decisions on who gets hired at the team level.").

147. *Cf.* Schenkel-Savitt, *supra* note 74, at 26 (noting that in some circumstances even supervisory control may not be enough to create liability).

148. *See* Ron Borges, *Report Spelled It out in Black and White*, BOSTON GLOBE, Oct. 6, 2002, at C7 (stressing that if any substantive changes are to be made in team hiring practices, "the mind-set of NFL owners has to be changed").

Why does the League go to the trouble of issuing policy statements concerning discrimination in its franchises?[149] In fact, to a limited extent, the NFL *is* responsible for oversight of its franchises.[150] It lays the groundwork and basic rule structure that all teams in the League are to follow, including rules of when a team can interview a coach and who can be interviewed.[151] Whether this activity opens the NFL up to litigation in terms of employment discrimination is unlikely, largely because the individual franchises would be considered the employers, not the League itself.[152]

The NFL, like any public business, is highly concerned with its public image, as the public is largely responsible for the success of the League itself.[153] When the League offers suggestions to its member franchises in terms of racial awareness, it is largely seeking to improve its relationship with the paying public by being seen as sensitive to important and divisive social issues.[154]

Such concerns, however motivated, are laudable, but that likely does not translate into liability for the discriminatory activities of its member franchises.[155] The League does not make the ultimate hiring decisions for the franchises, nor can it compel a team owner to hire a candidate not of his own choice.[156] Though the League should be encouraged to continue making issues of race known to the

149. *See generally* Wilbon, *supra* note 53, at D01 (explaining the League's implementation of the "Rooney Rule" regarding diverse candidate slates for head coach hiring).

150. *See* Sam Farmer, *NFL Defends Policies*, L.A. TIMES, Oct. 2, 2002, at D8 (quoting League spokesman Greg Aiello asserting that the League "take[s] the issue very seriously and ha[s] initiated several programs in recent years under Commissioner . . . Tagliabue to ensure that our hiring practices are fair, and that all coaches have opportunities to advance . . ."); Wilbon, *supra* note 53, at D01 (suggesting that some League rules are not taken seriously by the teams).

151. *See* Lev, *supra* note 146, at 1 (referring to the League policy against interviewing during the playoffs).

152. *See* 42 U.S.C.A. § 2000e(b) (West 1996) (defining "employer" for the purposes of Title VII).

153. *See generally* Vito Stellino, *The Powers That Be: We Present the 10 Most Influential People in the NFL, the Ones Who Have Made It the Most Successful Pro League Around*, FOOTBALL DIG., Nov. 2002, *available at* http://www.findarticles.com/cf_0/m0FCL/3_32/92352104/print.jhtml (copy on file with the *McGeorge Law Review*) (noting that the NFL is the most successful sports league in the nation, largely due to its TV ratings and TV contracts, but suggesting that "there's no guarantee that the league will sustain its success"); *see also* Cochran & Mehri, *supra* note 2, at 16 (noting that "the league operates at the epicenter of national consciousness").

154. *Cf.* Dennis Dillon, *Guiding Might: NFL Commissioner Paul Tagliabue Wields Power Wisely From the Top of Pro Sports' Most Successful League*, SPORTING NEWS, Dec. 31, 2001, *available at* http://www.findarticles.com/cf_0/m1208/53_225/82012715/print.jhtml (copy on file with the *McGeorge Law Review*) (explaining that the reason behind Tagliabue's decision to cancel the weekend games scheduled in the wake of September 11th's terrorist attacks was not wanting to "send a mixed message to the American people").

155. *See* 42 U.S.C.A. § 2000e(b) (defining "employer" for the purpose of determining proper defendants).

156. *See* Lev, *supra* note 148, at Cover (explaining that "[t]here's only so much the league and Commissioner Paul Tagliabue can do"); *see also* Borges, *supra* note 136, at C7 (discussing the hiring statistics for minority coaches in the NFL and stating that "until . . . convinced or forced to do otherwise . . . '[p]eople [will] hire who they want.'").

team owners, it should not be held responsible if the owners choose to ignore those issues.[157]

2. *The Franchises as Defendants*

The more plausible defendants are those responsible for the alleged discrimination, the team owners and general managers;[158] the League office and the Commissioner do little within the framework of head coach hiring.[159] It stands to reason that those actually implementing those principles in their employment practices, or allegedly not implementing them, should ultimately bear the responsibility.[160]

IV. CAN A PRIMA FACIE CASE BE MADE?

Having established that the franchises constitute the more likely target for a black head coach candidate's claim of racial discrimination, the head coach candidate must then establish a prima facie case.[161]

A. *Disparate Treatment*

Under a disparate treatment theory, a black head coach candidate would have a fairly simple and straightforward prima facie burden.[162] He would have to show (1) that he is black; (2) that he applied for a position for which he was qualified; (3) that the team did not hire him; and (4) that the position continued to be held open after his rejection.[163]

The only potentially challenging burden in this prima facie showing concerns the candidate's qualifications.[164] The first and third prongs would be self-evident as prerequisites to a Title VII claim.[165]Assuming that the plaintiff coach has

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157. *See* Borges, *supra* note 148, at C7 (emphasizing that "the mind-set of NFL owners has to be changed").

158. *See* 42 U.S.C.A. § 2000e(b) (providing the relevant definition of "employer").

159. *See supra* Part III.C.1 (observing that the League and Commissioner only establish basic principles for the franchises to abide by in making their hiring decisions).

160. *See, e.g.*, Michael Marot, *Tagliabue Discusses NFL Minority Hiring*, WASH. POST, Feb. 19, 2003, *available at* http://www.washingtonpost.com/ac2/wp-dyn/A31557-2003Feb19?language=printer (copy on file with the *McGeorge Law Review*) (describing the process adopted by the NFL League office in response to recent criticism concerning minority hiring, and its less than successful implementation at the franchise level).

161. *See supra* Part III (discussing the requirements and mechanics of establishing a prima facie case).

162. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (setting out the four pronged test).

163. *Id.*

164. *See* Wooster, *supra* note 57, § 7 (discussing the application of the criteria mandated by the *McDonnell Douglas* test).

165. *See supra* Part III (examining how Title VII applies to racially motivated discriminatory hiring practices).

acquired the relevant experience from previous assistant coaching positions or otherwise demonstrates the requisite knowledge of the game, the prima facie burden is not a heavy one.[166]

The burden of production then would shift to the franchise to show a valid nondiscriminatory reason for not hiring the plaintiff.[167] Again, this is not a particularly demanding showing.[168] The team could allege any number of reasons for not hiring a particular individual—he was not "the right fit" for the organization, he did not demonstrate sufficient knowledge in a particular area or did not have the number of years of head coaching experience that the franchise requires, and the list could go on.[169] Any such allegation would serve to place the burden back onto the plaintiff to show that the proffered reason was actually a pretext for racial discrimination.[170]

This argument alleging that the proffered reason was merely a pretext for racial discrimination will likely be the most burdensome challenge to the plaintiff.[171] Because the ultimate goal of the plaintiff in a discriminatory treatment case is to prove the discriminatory intent behind the defendant's actions, the plaintiff's proof must go to the subjective motivations of the franchise hirer.[172] Beyond a "smoking gun" document that expressly demonstrates that a particular franchise utilizes racially motivated hiring practices, such proof could be difficult to uncover.[173] Therefore, the plaintiff's ability to offer proof of discriminatory motivation would determine the success of a suit for disparate treatment.[174]

Without a "smoking gun" document, the analyses compiled by both Professor Madden and Cochran and Mehri are insufficient to prove actual intent on the part of franchise owners.[175] Thus, if the case were to be brought on a disparate treatment theory, the result would depend in large part upon the

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166. *See supra* Part III (implying that defendants may concede an applicant's qualifications and argue for a nondiscriminatory motive behind the hiring practice at issue).

167. *McDonnell Douglas*, 411 U.S. at 802; *see supra* Part III.A.1-2 (clarifying that the burden of persuasion remains on the plaintiff and only a burden of production to rebut plaintiff's prima facie case is shifted to the defendant).

168. *See McDonnell Douglas*, 411 U.S. at 802-03 (noting that "[w]e need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire").

169. *See* Borges, *supra* note 148, at C7 (observing that franchises "hire who they want").

170. *See McDonnell Douglas*, 411 U.S. at 804 (emphasizing that the plaintiff "must . . . be afforded a fair opportunity to show that [the] stated reason for . . . rejection was in fact pretext").

171. *See* Schenkel-Savitt, *supra* note 74, at 32-33 (providing cases in which plaintiffs attempted to prove pretext, some successfully, others unsuccessfully).

172. *See id.* at 32 (stating that "[t]he employee must show not only that the reason was false, but also that discrimination was the real reason").

173. *See generally id.* at 30-34 (describing particular findings of pretext proven and not proven in Title VII cases).

174. *See supra* Part IV.A (forecasting the evidentiary hurdles a plaintiff would face in a disparate treatment case).

175. *See supra* Part II (examining statistical analysis as opposed to evidence of explicit discriminatory intent).

advocacy of the plaintiff's attorney in convincing the trier of fact to infer intent from the facts of the plaintiff's case.[176]

B. *Disparate Impact*

Disparate impact analysis applies in cases concerning facially neutral employment practices.[177] If a plaintiff is unable to prove intentional discrimination on the part of the employer, disparate impact analysis may be appropriate, and may enable a Title VII plaintiff to succeed.[178]

In the circumstance of a black head coach candidate, the statistics laid out in Professor Madden's report and outlined in the Cochran and Mehri analysis may prove invaluable.[179] According to *Wards Cove*, the comparison between the race of otherwise qualified job applicants and the race of those who hold the jobs at issue is the relevant inquiry; a mere disparity in the overall racial composition of the relevant work force is not the appropriate comparison.[180] A black head coach candidate could meet that burden fairly easily with the application of Professor Madden's research study.[181] Her statistics over the past fifteen years make a strong showing that something other than a pure desire for the best possible head coach motivates NFL franchises in their hiring decisions.[182]

A showing of disparate impact, however, requires more than a mere statistical comparison.[183] The claim must be based upon an actual employment practice that, though neutral on its face, creates a discriminatory impact in its application and hence provides the causal link missing when a plaintiff cannot establish actual discriminatory intent on the part of the employer.[184] In *Griggs*, the unlawful employment practice was the requirement that all employees perform

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176. *See* McDonnell Douglas v. Green, 411 U.S. 792, 804-05 (1973) (listing a number of factors that could persuade a court to infer intent).

177. *See supra* Part III.B (discussing disparate impact analysis); Wooster, *supra* note 57, § 2(a) (reviewing the background of "disparate impact theory liability").

178. Wooster, *supra* note 57, § 2(a).

179. *See supra* Part II (summarizing the report authored by Professor Madden and reviewing the work by Cochran and Mehri).

180. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650-51 (1989).

181. *See supra* Part II (showing marked disparity in the racial profile of NFL head coaches as compared to qualified black candidates).

182. *See* Cochran & Mehri, supra note 2, at 13 (implying that, although the lack of diversity in NFL head coach and general manager positions may not be overt racism, it may be "about people being most comfortable with those who are most familiar to them."). *But see* Roger Clegg, *Cochran and the Coaches—Johnnies's Next Lawsuit?*, NAT'L REV., Oct. 10, 2002, *available at* http://www.nationalreview.com/script/printpage.asp?ref =/clegg/clegg101002.asp (copy on file with the *McGeorge Law Review*) (asking "[w]hy, after all, would an owner want to hire anyone but the best qualified coach — that is, the coach who he thinks will win the most games?" and concluding that "[i]t seems very unlikely that owners would be willing to forego . . . [money and success] simply to indulge their taste for racial discrimination").

183. *See supra* Part III.B (outlining the requirements of a disparate impact claim).

184. *See supra* Part III.B.2 (discussing the importance of showing that a statistical disparity resulted from an employment practice).

satisfactorily on standardized tests that were completely unrelated to job performance.[185] In *Wards Cove*, the challenged hiring practices included nepotism, separate hiring channels, and rehiring preferences.[186]

Neither Professor Madden's report nor Cochran and Mehri's analysis indicates that any particular employment practice on the part of the franchises is responsible for the statistics showing the wide disparity in the races of NFL head coaches.[187] Without establishing a specific employment practice, it does not appear that an allegedly injured black head coach candidate could prove successful under a disparate impact theory.[188]

If a candidate could prove a specific discriminatory employment practice (such as the consistent failure of a franchise to utilize a diverse candidate slate when scheduling head coach interviews), the franchise could then respond by claiming that the practice has a legitimate business justification.[189] The franchise's success in this argument will largely depend on the practice under attack and the proof offered to sustain it (for example, failure to use a diverse candidate slate would not likely pass muster, as it has little to do with determining a candidate's qualifications for a particular job).[190]

Even where an NFL franchise could show a legitimate business justification for the practice under review, however, a plaintiff head coach candidate might still prevail by showing equally effective alternatives to the challenged practice that would not result in a discriminatory impact.[191] If the franchise were to refuse to adopt the alternatives, such refusal could be grounds for proving that the practice under review is essentially pretextual.[192]

V. SOLUTIONS

It seems reasonable to proceed on the assumption that NFL franchises have no legitimate hiring practices that merely incidentally produce results like those found in Professor Madden's report.[193] It seems equally reasonable that whatever justifications for the individual hiring practices that NFL franchises put forth will not likely rise to a level sufficient to overcome the demonstrated historical

185. Griggs v. Duke Power Co., 401 U.S. 424, 428, 436 (1971).

186. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 647-48 (1989).

187. *See supra* Part II (identifying no underlying employment-related rationale for the statistics).

188. *See Wards Cove Packing Co.*, 490 U.S. at 657 (establishing that "a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack").

189. *See id.* at 659 (stating that "[t]he touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice").

190. *See id.* (noting that "[a] mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices").

191. *Id.* at 660.

192. *Id.* at 660-61.

193. *The Madden Report*, *supra* note 4, at 10 n.6.

discrepancy in the hiring of black head coaches.[194] But is a Title VII lawsuit an appropriate, or even worthwhile, response? After all, any head coach candidate "brave enough to be the plaintiff in such a suit will no doubt be a martyr for the cause, effectively ending his career."[195] Following are some potential solutions.

A. *"The Fair Competition Resolution"*[196]

"The Fair Competition Resolution" (the Resolution) is Cochran and Mehri's proposed response to the situation brought into focus by Professor Madden's statistical analysis.[197] Essentially, the Resolution grants to the NFL Commissioner the power to reward a franchise that diversifies both its front office staff as well as its coaching ranks with extra draft picks each year.[198] In addition to the power to grant picks, the Resolution also penalizes teams that do not utilize a racially diverse final candidate slate when making determinations in hiring not only head coaches, but also assistant head coaches and coordinators, as well.[199] Any team not following the Resolution's procedures would have to notify the Commissioner of its intentions, and would lose draft picks accordingly.[200]

Apparently inspired by the Resolution, the NFL's committee on workplace diversity drafted a franchise hiring policy that incorporated much of what the Resolution mandates.[201] Unfortunately, the policy, known as the "Dan Rooney Rule," has met with little success in its early stages.[202] Five teams have hired head coaches since the conclusion of the 2002-2003 season, and only one of the teams

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194. *See* Wilbon, *supra* note 53, at D01 (noting that "[t]he NFL's hiring practices, when it comes to coaches and executives, have been so exclusionary for so long, that today's owners and executives have to pay up for the last 80 years").

195. Bryan Burwell, *Lost Opportunities (African-American Football Coaches)*, SPORTING NEWS, Feb. 2, 1998, *available at* http://www.findarticles.com/cf_0/m1208/n5_v222/20210121/print.jhtml (last visited Aug. 31, 2003) (copy on file with the *McGeorge Law Review*).

196. *See* Cochran & Mehri, *supra* note 2, at ex. F (outlining the scope of their proposal).

197. *Id.*

198. *See id.* (proposing that "the Commissioner will survey the NFL Teams [sic] to make a factual record of the basis for awarding these draft picks").

199. *Id.* (requiring teams to forfeit a draft pick if they do not use a diverse candidate slate).

200. *Id.* (stating that failure to use diverse final slates in the hiring of head coaches would result in the loss of a first round pick; failure to use diverse final slates in hiring assistant head coaches and coordinators would result in the loss of a third round pick).

201. *See* Letter from Johnnie Cochran, Jr. & Cyrus Mehri, to Paul Tagliabue, Commissioner, National Football League, (Jan. 23, 2003), *available at* http://espn.go.com/nfl/playoffs02/s/2003/0122/1496988.html (last visited Aug. 31, 2003) [hereinafter Cochran/Mehri Letter] (copy on file with the *McGeorge Law Review*) (crediting the Commissioner for "appointing a permanent Workplace Diversity Committee" in response to Cochran and Mehri's call for reforms). *See generally* ESPN.com, NFL, *NFL Probing Whether Lions Followed Guidelines*, Feb. 14, 2003, *available at* http://sports.espn.go.com/espn/print?id=1508765&type=news (last visited Aug. 31, 2003) (copy on file with the *McGeorge Law Review*) (noting that the hiring policy does not establish penalties for failure "to adhere to the new guidelines").

202. *See* Cochran/Mehri Letter, *supra* note 201 (indicating that Dan Rooney was responsible for implementing many of Cochran and Mehri's proposed reforms); Wilbon, *supra* note 53 (claiming that "[t]he Dan Rooney Rule . . . is something that for the most part has been treated as a joke").

hired a black candidate.[203] Most notably, the Detroit Lions organization has come under a great deal of criticism for its hiring of Steve Mariucci.[204] Although all thirty-two NFL team owners reportedly agreed "to interview at least one minority candidate" for every head coaching vacancy, the Lions failed to do so.[205] This has raised concern that there may be a lack of commitment on the part of the franchises to follow through with their agreement.[206] As a result of his failure to interview at least one black head coach candidate, the NFL fined Millen $200,000 and warned future violators of the rule that fines could go as high as $500,000.[207]

The San Francisco 49ers organization has also met with criticism for hiring Dennis Erickson.[208] Cochran and Mehri, however, view San Francisco's hiring process "as a model for how NFL teams *should* operate a thorough search."[209] In contrast, one of the problems associated with Detroit's head coach search was the feeling on the part of black head coach candidates that Matt Millen, President of the Detroit Lions, had no intention of hiring anyone other than Steve Mariucci; as a result, five minority candidates refused requests to interview for the Lions position.[210] A similar situation confronted the Dallas Cowboys, another franchise in search of a head coach following the 2002-2003 season.[211] Jerry Jones, the owner of the Dallas Cowboys, appeared to have had no intention of hiring, or even interviewing in person, a minority head coach candidate.[212]

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203. *See* Wilbon, *supra* note 53, at D01 (noting that the only black head coaching hire of 2003 was Marvin Lewis, who was hired by the Cincinnati Bengals).

204. *See, e.g.*, Leonard Shapiro, *Lions Get Mariucci and Lots of Criticism*, WASH. POST, Feb. 5, 2003, at D01 (explaining that "the Lions' hiring process . . . reportedly did not include interviews with any minority candidates").

205. Associated Press, *NFL Fines Lions $200K Over Coach Search*, July 25, 2003, *available at* http://www.3andout.com/printer-653.shtml (last visited Aug. 31, 2003) [hereinafter *NFL Fines Lions*] (copy on file with the *McGeorge Law Review*).

206. *See* Wilbon, *supra* note 53, at D01 (quoting a labor law attorney who compared the NFL to Fortune 500 companies and claimed that "[t]hey've got their heads in the sand").

207. *NFL Fines Lions*, *supra* note 205.

208. *See* Jarrett Bell, *Coaching Hue and Cry Continues*, USA TODAY, Feb. 11, 2003, *available at* http://www.usatoday.com/sports/football/afl/2003-02-11-coaching-cry-x.htm (copy on file with the *McGeorge Law Review*) (noting that Erickson, a white coach, "never posted a winning record in four seasons with the Seattle Seahawks").

209. *Id.* (acknowledging that the 49ers interviewed black defensive coordinators Greg Blache and Ted Cottrell during their head coach search, who "by their own accounts didn't feel they were token gestures").

210. Associated Press, *Millen to Be Queried About Coaching Search*, Feb. 14, 2003, *available at* http://www.nfl.com/teams/story/DET/6188663 (copy on file with the *McGeorge Law Review*) (noting that Millen intends to meet with NFL officials to discuss the process involved in hiring Mariucci).

211. *See* Bell, *supra* note 208 (criticizing Dallas for conducting telephone interviews with minority candidates who "presumably preferred face-to-face talks"); Cochran/Mehri Letter, *supra* note 201 (describing Jerry Jones's hiring of Bill Parcells as a "transparent end run around the Rooney plan").

212. *See* Cochran/Mehri Letter, *supra* note 201 (criticizing the process that took place in Dallas, where one "minority . . . candidate [was] interviewed by telephone and other [non-minority] candidates [were] interviewed in person").

The problem with the Dan Rooney Rule seems to be its general lack of enforcement mechanisms and its failure to provide a positive incentive by which a team owner or general manager might be encouraged to follow its mandate, fines like Millen's notwithstanding.[213] Particularly in light of Dallas' disregard of the Rooney Rule, it appears that the "grown men who own and run pro football teams get a free pass when they make a mockery of the rules."[214]

In its current state, the Rooney Rule is not an effective means by which to achieve the progress Cochran and Mehri desire.[215] As Marvin Lewis himself stated: "Really, you cannot tell someone who to hire. . . . When I put together my staff, I wanted to hire guys who I knew. You want to know what kind of stress he's under and how he handles stress."[216]

B. Uniform Head Coach Candidate Slates

One of the major thrusts of the Cochran/Mehri "Fair Competition Resolution" is its emphasis on franchises utilizing a diverse slate of head coach candidates when making hiring decisions.[217] The purpose behind diverse candidate slates is to ensure that every team in the League is exposed to minority candidates who would not otherwise have been granted an interview given current and past practices.[218] The dominant sentiment around the League presently is that a coach often will have been selected before the vacancy requiring the new coach exists because the general manager or president will have planned for the contingency beforehand.[219] That being so, few minority candidates will want to interview for a job that would in any case go to someone else.[220]

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213. *See* Wilbon, supra note 53, at D01 (discussing several parties' frustration with the current state of affairs); *cf.* Shapiro, *supra* note 204, at D01 (quoting Dan Rooney, the head of the NFL's diversity committee, upon hearing of Detroit's hiring decision: "I will have discussions with the committee and the Lions to see what occurred and where to proceed in the future.").

214. *See* Wilbon, *supra* note 53, at D01 (comparing the outcry following LeBron James's apparent disregard for the rules governing high school athletics with the more serious dilemma regarding diversity in professional football).

215. *See id.* (quoting Mehr as stating that "[t]he Rooney Rule is a good game plan . . . but there's been poor implementation and execution").

216. *See* Associated Press, *Tagliabue Discusses Minority Hiring Practices*, Feb. 19, 2003, *available at* http://www.nfl.com/teams/story/CIN/6199149 (last visited Sept. 7, 2003) [hereinafter *Tagliabue Discusses Minority Hiring Practices*] (copy on file with the *McGeorge Law Review*) (quoting Lewis in the context of discussing the Rooney Rule with Commissioner Tagliabue).

217. *See* Cochran & Mehri, *supra* note 2, at ex. F (requiring that "all Teams . . . compile and select from a racially diverse final candidate slate when hiring a Head Coach").

218. *See id.* at i-iv, 14-16 (predicting that such an approach will lend credibility to the hiring process in the NFL and restore its credibility to the fan base).

219. *See, e.g.*, Leonard Shapiro, *Upshaw Protests Lions' Hiring*, WASH. POST, Feb. 6, 2003, at D05 (noting that Matt Millen had "made it well known from the outset that Mariucci was the man he would target as his next coach").

220. *See id.* (claiming that several minority candidates dropped out of the interviewing process with the Detroit Lions once they learned of Millen's intention to hire Mariucci).

Diverse candidate slates, however, could provide minority candidates with some hope that no hiring decisions will have been preordained.[221] Such a hope would go far toward ensuring that minority coaches actually participate in an interviewing process that may have originally been closed to them, either through their own misperception or through the stated intent of the organization to hire a particular individual.[222]

The concern with the implementation of a diverse candidate slate requirement is that the mere formulation of a diverse candidate slate would not necessarily eliminate the motive of the owner or general manager to choose the head coach before the interviewing begins; the diverse slate could serve only to appease the League office while providing little substantive assistance to minority candidates who would not otherwise receive the opportunity to interview.[223] Because the position of head coach is so vital to the success of a franchise, "no owner or general manager is going to make a decision based on tokenism. They should not be forced to hire anyone other than their first choice as a head coach or manager."[224]

The contrary position, however, may also have merit. If franchises were required to interview at least one minority candidate, that candidate could benefit not only by being available should things not work out with the franchise's first choice, but also by garnering a reputation as a quality interviewee around the League.[225] In any case, the League office would need to enforce such a policy strictly if it is to have any impact on team owners.[226]

C. *Change from Within*

Perhaps the most effective method for altering the perceptions of team ownership regarding minority candidates, and team hiring practices as a result, is changing the organization from within by diversifying front office personnel.[227] Cochran and Mehri have recognized the potential of this idea and have

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221. *Cf. Anderson on the Web: The NFL's Woeful Track Record on Diversity and Head Coaching Jobs*, PITTSBURGH POST-GAZETTE, Feb. 7, 2003, *available at* http://www.post-gazette.com/sports/columnists/20030206shelly0207p2.asp (last visited Sept. 7, 2003) [hereinafter *NFL's Woeful Record*] (copy on file with the *McGeorge Law Review*) (noting that this kind of system "has helped produce a more balanced roster of coaches at the assistant level throughout sports").

222. *See* Bell, *supra* note 208 (indicating that "being interviewed is the key component toward affecting the bottom line of actual hires").

223. *Cf. NFL's Woeful Record*, *supra* note 221 (claiming that "[i]t was obvious to everyone that those men would have gotten only token interviews to conform to the new policy," in reference to the minority candidates contacted concerning the Detroit Lions position).

224. *Id.*

225. *Id.* (noting that "if [the minority candidate is] dynamite in the interview, maybe word will spread and they will be attractive to other teams looking for a head coach").

226. *See* Wilbon, *supra* note 53, at D01 (suggesting that the team owners who have skirted the new policy lately simply "don't feel like complying").

227. *See Tagliabue Discusses Minority Hiring Practices*, *supra* note 216 (asserting that "[h]iring more minorities in decision-making jobs will lead to the hiring of more minorities as coaches").

incorporated it into their "Fair Competition Resolution," though the emphasis of their argument has been, and continues to be, head coaches.[228]

Diversification in franchise front office personnel may already be happening; executive posts in Jacksonville, Arizona, Baltimore, and Atlanta have been filled by minorities.[229] In addition, the minority coaching "pipeline" has increased with the addition of eight new black coordinators.[230]

One key stepping stone may be the addition of minority owners to the owners pool.[231] The primary obstacle is that potential purchasers of sports franchises must have hundreds of millions of dollars in order to become a team owner, and few, regardless of race, have such resources.[232] One of those few just purchased the newest National Basketball Association franchise, to be located in Charlotte.[233] Robert Johnson, the billionaire African American founder of the Black Entertainment Television network, paid approximately $300 million for the team.[234] He commented that "diversity, in my opinion, in our society and in the structure of the [National Basketball Association], must be considered."[235] Johnson has endorsed a willingness, even an imperative, "to consider diversity as a goal, as an objective . . . ," which could signal a trend in sports ownership.[236] If such a trend takes hold in the NFL, the lack of diversity among head coaches may very well cure itself and open the eyes of ownership to the benefits that a diverse staff can bring.[237]

VI. CONCLUSION

The current lack of diversity within the head coaching ranks of the National Football League is disturbing, particularly given the qualifications of minority head coach candidates presently within reach of the pinnacle of their profession.[238]

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228. *See* Cochran & Mehri, *supra* note 2, at ex. F (listing the proposed incentives for diversifying front office personnel as a part of their plan).

229. Bell, *supra* note 208.

230. *Id.*

231. *See* Shaun Powell, *Black, White, and Green*, SPORTING NEWS, July 13, 1998, *available at* http://www.findarticles.com/cf_0/m1208/n28_v222/20933414/p1/article.jhtml (last visited Aug. 31, 2003) (copy on file with the *McGeorge Law Review*) (speculating that "a black owner likely would be more reasonable with jobs accessible to all, instead of to those members of the old-boy network who always seem to find work").

232. *Cf.* (commenting that "[o]wning a sports team isn't about skin color. It's about the color of the potential buyer's money").

233. Mike Kahn, *New Charlotte Owner Shows Another Way to Diversify NBA*, CBS SPORTSLINE.COM, Dec. 18, 2002, *at* http://www.sportsline.com/nba/story/6036337 (last visited Aug. 31, 2003) (copy on file with the *McGeorge Law Review*) (identifying Robert Johnson as the newest addition to the NBA owners pool).

234. *Id.*

235. *Id.*

236. *Id.*

237. *See* Cochran/Mehri Letter, *supra* note 201 (asserting that "[t]he appointment of minority candidates for General Manager and other top front office positions would send a strong message that progress is occurring" and "[o]ver time . . . will also mightily contribute to progress in the coaching ranks").

238. *See supra* Part II (discussing the extent of the disparity).

Johnnie Cochran, Jr. and Cyrus Mehri have intimated that this problem may finally be ripe for a legal remedy under Title VII.[239] If a plaintiff willing to sacrifice his future career as a head coach in the NFL comes forward with a cognizable claim, the franchise he attacks may very well face a damage award stiff enough to encourage other teams to diversify, lest they suffer a similar fate.[240]

A far better solution, however, would be for the ownership group finally to acknowledge the elephant in the locker room, and provide qualified minority candidates with genuine opportunities to interview with NFL teams. A divisive lawsuit will do little but foment disagreement and hard feelings between the two groups, and such a situation will do little to improve the currently lopsided racial complexion of the League's head coaches.[241]

239. *See supra* Parts II & III (reviewing the demographics of the NFL and the substantive and procedural requirements for a Title VII employment discrimination suit as established by statute and Supreme Court case law).

240. *Id.*

241. *See supra* Part V (discussing solutions to the racial imbalance problem).